No. 148 MISC.

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

1956 TERM

JOHN E. DAY, JR.,
PETITIONER,

vs.

COLONEL JAMES W. DAVIS, COMMANDANT
U. S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

THOMAS HOMER DAVIS,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner John E. Day, Jr., respectfully prays for a Writ of Certiorari and review of the judgment of the Court of Appeals, Tenth Circuit, affirming the judgment of the United States District Court for the District of Kansas, denying petitioner's Writ of Habeas Corpus, decided June 21, 1956, in said Circuit Court of Appeals and numbered in said Court, Case No. 5344.

No written opinion was handed down in the United States District Court for the District of Kansas. A Motion to Dismiss having been sustained. The judgment of the Court of Appeals affirming the judgment of the District Court was handed down, June 21, 1956, and is not yet reported in the Reporter System. A certified typed Transcript of the Record on file in said appeal, Case No. 5344, together with typewritten copy of Petitioner's Brief on Appeal and Respondent's Brief on Appeal, are before this court.

JURISDICTION.

Judgment of the Court of Appeals affirming the judgment of the District Court was entered June 21, 1956. Jurisdiction of the Supreme Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the act of February 13, 1925, (28 USCA) (1257, 2103, 2106 and 1254) Rule 38 of the Supreme Court.

SUMMARY OF MATTER INVOLVED.

The petitioner was a Private, serving in the United States Army in Korea. Petitioner was tried and convicted by Military Court Martial and sentenced to death. The sentence was confirmed by the President of the United States and charged with Murder of a native Korean, sentence was upheld by Army Reviewing Authorities, confirmed by two to one decisions in the United States Court of Military Appeals. Petitioner filed a Petition for a Writ of Habeas Corpus in the District

Court of the United States for the District of Kansas, Motion to Dismiss the Petition was sustained in the District Court. The Appeal was taken to the United States Circuit Court of Appeals for the Tenth Circuit which confirmed the judgment of the District Court on June 21, 1956. A Petition for Rehearing was denied by the Circuit Court of Appeals on the 9th day of July, 1956. The petitioner is colored.

QUESTIONS PRESENTED.

1. Did the failure of the law officer at the Court Martial Trial to instruct the Court Martial of the lesser included offense of unpremeditated murder constitute a denial to the petitioner of a full and fair trial in violation of its constitutional rights, under the Uniform Code of Military Procedure?

2. Did the Court Martial Trial of petitioner in effect amount to merely a sham and a pretense of a trial, thereby depriving the petitioner of a fundamentally fair trial under the Uniform Code of Military Procedure?

3. Does the fact that the corpus delicti was not established in the Court Martial Trial of petitioner deprive the Court Martial of jurisdiction of the petitioner?

REASONS FOR GRANTING WRIT.

(a) The evidence clearly showed that petitioner was intoxicated at the time of the alleged murder. He was tried on a charge of premeditated murder.

(b) The law officer failed to instruct the Court Martial on the meaning of the terms deliberately and with malice aforethought. He also failed to instruct the Court Martial on the lesser included offense of unpremeditated murder, under the Uniform Code of Military Procedure is mandatory, for the law officer to instruct the Court Martial on all lesser included offenses.

U. S. vs. Clark, (No. 190), 2 CMR 107, decided February 29, 1952;

U. S. vs. Roman (No. 191), 2 CMR 150, decided March 19, 1952;

U. S. vs. Banks (No. 382), 4 CMR 71, decided July 24, 1952;

U. S. vs. Stout (No. 497), 5 CMR 67 decided August 27, 1952;

U. S. vs. Baguex (No. 699), 8 CMR 106, decided March 13, 1953;

U. S. vs. Roy G. Dunnahoe, Private E—2 U. S. Army No. 6740 U. S. Court of Military Appeals, decided March 30, 1956.

(c) The Court of Appeals placed too narrow an interpretation on the decision of this court in Burns vs. Wilson, 346 US 137, as applied to the facts of this case.

(d) Full consideration of the fact that proof did not establish corpus delicti; that circumstances sur-

rounding the trial clearly showed that the trial was a sham and pretense of a trial was had in these cases.

BRIEF AND ARGUMENT.

QUESTION INVOLVED—No. I.

Did the failure of the law officer to instruct the jury on the lesser included offense of Unpremeditated Murder constitute a denial to the appellant of a full and fair trial in violation of his Constitutional Rights under the Uniform Code of Military Procedure?

The evidence in the Court Martial Trial showed that the appellant had been drinking heavily the day the alleged offense occurred and that he was acting strangely. The Uniform Code of Military Procedure and the rulings in Court Martial cases have repeatedly held *that the law officer must instruct the Court on the elements of the offense charged and as to lesser offenses fairly raised as reasonable alternates to that charged.*

United States vs. Clark (No. 190), 2 CMR 107, decided Feb. 29, 1952;
United States vs. Roman (No. 191), 2 CMR 150, decided March 19, 1952;
United States vs. Banks (No. 382), 4 CMR 71, decided July 24, 1952;
United States vs. Stout (No. 497), 5 CMR 67, decided August 27, 1952;
United States vs. Baguex (No. 699), 8 CMR 106, decided March 13, 1953.

It has been the contention of the Army even in the hearing on this case in the Court of Military Appeals

that there was no error in the fact that the law officer in the Court Martial Trial of appellant did not instruct the Court Martial on the lesser included offense of Unpremeditated Murder. They suggested in the Military Court of Appeals that the only difference between Premeditated Murder and Unpremeditated Murder under the Court was to be found in the element of premeditation. This, however, is not the sole difference between the two offenses under the Uniform Code of Military Procedure. One may be guilty of Unpremeditated Murder without an attempt to kill, if his act causing the death of another was inherently dangerous and evinced a wanton disregard of human life.

> Uniform Code of Military Justice, Article 118 (3), 50 USC, Section 712.2

The question imposed by the majority of opinion in the Court of Military Appeals, United States vs. Day, 9 Court Martial Reports, Page 46, was as follows:

> "The question, however, was the Court Martial aware of the difference and did the members know they could return a verdict of guilty of the lesser offense."

In the dissenting opinion of said case by the late Judge Brosman, page 59, he states that such reason was novel if not shocking, especially in a capital case. He stated that it appeared that his brothers on the court attempted to approach all instructional problems by speculation as to whether the members of the Court Martial *in fact* knew and fully comprehended what the law officer

would have said to them had he said anything at all. He further pointed out that in all cases the real answer would be that the Court did have presented to it, fully, properly and accurately, the correct legal markers to guide its decision. The Judge further stated that the sound position, he believed, was the Court's earlier decision in the case of

United States vs. Clay (No. 49), 1 CMR 74, decided November 27, 1951.

Judge Brosman also clearly points out that the entire record shows that the law officer did not instruct his Court Martial on the lesser included offense of Unpremeditated Murder. In his opinion, this failure constituted clear prejudicial error. On the Habeas Corpus Hearing in this case on November 18, 1954, the Honorable Arthur J. Mellott, Chief Judge, expressed his opinion on this phase of the law and in substance agreed with Judge Brosman's dissenting opinion. (Transcript of Record in this case, page 1)

In connection with this phase of the law, the writer respectfully refers this Court to the opinion and the dissenting opinions in the Court of Military Appeals in appellant's case.

United States vs. John E. Day, Jr., 2 USC MA 416;
9 CMR 46;
Vol. 9, Court Martial Reports 1952-53, beginning at page 46.

Certainly the record in this case with the evidence of heavy drinking on the part of appellant beginning at approximately 2:00 P.M. and continuing through most of the day until approximately midnight, clearly made this case where in addition to the charge of Premeditated Murder, there had to be the lesser included offense of Unpremeditated Murder. The law officer must instruct the Court Martial on this lesser included offense but did not in this case. Therefore, the Court Martial actually did not have presented to it, one of the charges of which the appellant could have been found guilty. It is true that the Military Court of Appeals by a two to one decision held this was not error and that one Judge dissenting held it to be clear prejudicial error. It is the contention of the writer, that the matter goes far beyond the question of error. In the recent case of

Burns vs. Wilson, 74 SCT 1045;
346 US 137,

for a separate opinion on said case by Mr. Justice Frankfurter. In 74 SCT 3. The Supreme Court held in substance that the narrower doctrine formerly applied on Habeas Corpus Hearings to a review of Military Court Martial Trials, would not be strictly adhered to; that Federal Courts by Habeas Corpus could see to it that a member of the armed forces was afforded a fundamental fair hearing under the Military Code in the Court Martial Proceedings against him. In this case, the Military Code provided that the Court Martial should have been instructed by the law officer on the lesser included offense of Unpremeditated Murder. The evidence

in the case of drunkenness and the strange behavior of appellant, certainly called for such an issue to be presented at the Court Martial Trial of the appellant. Since the Code also is mandatory to the effect that the law officer *must* so instruct, it is apparent that the appellant here was denied a fundamentally fair hearing at his Court Martial Trial by reason of the failure of the law officer to so instruct the Court Martial Court. In other words, the question of whether or not the appellant was guilty of the lesser included offense of Unpremeditated Murder was never before the Court Martial for its consideration.

QUESTION INVOLVED—No. II.

Did the Court Martial Trial of petitioner amount to merely a sham and a pretense of a trial, thereby depriving the petitioner of a fundamentally fair trial under the Uniform Code of Military Procedure?

The alleged offenses under which the appellant was tried by the Military Court Martial took place at approximately midnight on the 23rd day of December, 1950, at Seoul, Korea. The Chinese Communists had just entered the Korean War and were driving the American forces Southward out of Seoul (Transcript our case 2174 HC, page 13). In other words, war was actually in progress and the American forces were evacuating Seoul. The only investigation made of this case at the time of this offense apparently was made by Walter L. Foster, Warrant Officer, 51st Criminal Investigation Detachment, APO 201, United States Army (Transcript

Court Martial Proceedings, page 50). Appellant had been drinking Korean wine and whiskey, as well as American whiskey, from approximately 2:00 P.M. until around midnight, the time of the alleged offense (Transcript our case 2174 UC, pages 14-15). The appellant was not questioned by Warrant Officer Foster from midnight until after daylight on the morning following the alleged offense when he furnished Foster a written statement about the offense which Foster eventually tore up. Foster prepared a statement and appellant eventually signed it so that he could get out of Seoul before the Chinese Communists entered the city. The appellant was not placed in confinement until September 22nd, 1951 (Transcript our case 82174 HC, page 23). A pre-investigation was held in May, 1951, and no charges were apparently filed against appellant by reason of that investigation. The charges apparently were not preferred against appellant until August, 1951. The trial of the appellant did not occur until approximately over ten months elapsed since the offense.

The actual Court Martial Trial convened at 10 o'clock A.M. on October 1st, 1951 (page 1, Transcript of Court Martial proceeding). The Court Martial was closed at four minutes after 4:00 P.M. on the same day for the Court to consider its verdict. Fifteen minutes later, at 19 minutes after 4:00 P.M., the Court Martial returned its verdict finding the appellant guilty of Charges 1 and 2 but not guilty of Charge 3. They, therefore, considered the case for only fifteen minutes (page 79, Tran-

script of Court Martial Proceedings). In other words, the all-over time of the trial was approximately six hours. The trial had taken place with the enemy about to enter Seoul and with the American forces evacuating the city.

The appellant desired as a witness a Korean Nationalist whom he claimed was the only eye witness to the events pertaining to the offense. He states that the trial counsel did not have this witness present and told him that it wouldn't matter, that everything would be taken care of on review of the case.

There is no actual proof in the record that the victim was actually dead. Investigating Officer Foster testified that in his opinion the man was dead; however, Foster also testified, as follows:

> "I noticed that there were two holes—two small holes—with a small amount of blood oozing out of them in the center of the chest."

(Transcript of Court Martial Trial, page 52.) The only other testimony as to the body of the victim was that of a Korean Policeman named Lo Soong Hyo. He testified that he did not see this body until sometime on the 25th day of December, 1950. The alleged shooting having taken place around midnight on the 23rd day of December, 1950. So, as much as 24 hours could have elapsed before this Korean Policeman saw this body in the cold unheated basement where the alleged offense took place. All he did was to order the body buried. There is no testimony in the record that the body was actually

buried (Transcript of Court Martial Proceedings, pages 64-66). No medical testimony whatever was offered to prove the victim was dead, or that he died from gunshot wounds. It is significant that Sergeant Foster at the time he saw the body, saw blood oozing out of the wound on the chest. The body, according to his testimony, was lying on its back and certainly blood was still oozing from the wounds. It is improbable that the victim was dead at the time Foster testified the victim was dead. The body could have stayed in this abandoned basement in freezing temperatures as long as 24 hours before any other person observed it. It might well have been that the bullet wounds did not penetrate the heart and that if the victim had had proper medical attention, he would not have died as a result of the bullet wounds but that having been left for a period of 24 hours, under such conditions could well have died from exposure. It is highly significant that in the trial, the Army Defense Counsel for appellant did not cross examine either Warrant Officer Foster, or the Korean Policeman, in connection with their testimony as to whether or not, the victim was dead. This phase of the case certainly shows that the alleged trial of the appellant was a sham and a pretense because the Corpus Delicti was not established.

The law officer in charge of the jury stated the elements of the defense under Charge 1, were as follows:

1. That the accused unlawfully killed a certain person named, by certain means, as alleged.
2. That the victim is dead.

3. That the death resulted from an injury received by the victim.

4. That such injury resulted from an act of the accused.

5. That the death occured within an hour and a day of such act.

6. That such killing was with malice aforethought.

7. That the killing was premeditated.

See Court Martial Reports, Vol. 9, Opinion Case, United States vs. John E. Day, Court of Military Appeals (page 52).

Certainly from this record, the Court Martial Trial failed to establish conclusively, any of these elements by which they were instructed, had to be found before the appellant could be convicted.

It must be remembered that this trial took place under actual war conditions. That the main headquarters of the United States forces were at Seoul and there were abundant medical personnel, including doctors, who could have been produced to furnish medical testimony as to whether or not the victim was dead, what he died from, and whether or not he would have survived had he been given proper medical attention. It must further be remembered that the material witness claimed by the appellant to be the only eye witness was not produced in his defense; that over ten months had elapsed since the commission of the alleged offense; that one of the witnesses used by the prosecution could not remember at the trial enough to testify to the actual events and that

a statement he had previously given was offered and received in evidence and considered as his testimony when he was actually present in the Court; that the appellant did not have a chance to confer with his defense counsel until two or three days prior to the actual trial and that the trial lasted only approximately six hours, including all phases thereof. Certainly this set of facts clearly shows that appellant was not afforded a full and fair trial as he was entitled to under the provisions of the Constitution of the United States.

QUESTION INVOLVED—No. III.

Was Corpus Delicti established at the Court Martial Trial of the appellant?

A large part of the details including the testimony of Warrant Officer Foster, the only investigating officer in this case, and the testimony of the Korean Policeman Lo Soong Hyo have been set out in the argument of the above preceding question. Was the instructions of the law officer to the Court Martial as to the seven elements of the offense charged against the appellant under Charge I, or set out in the argument above. Referring to those elements, the Court Martial instructed that it first, must be proven by the prosecution that the accused unlawfully killed a certain person named, by a certain means. Second, that he was dead. In this connection it is significant to again point out to the Court that Warrant Officer Foster stated that he saw this alleged victim at approximately midnight on the 23rd day of December, 1950; that he was lying on his back and that

blood was oozing out of two wounds in the chest. While the writer of this Brief does not claim to be a competent medical authority, yet it seems apparent that if blood was still oozing out of the wounds, the person must have been alive at that time because blood does not flow after death. Yet, the Warrant Officer testified that in his opinion the man was dead at that time. No medical authority was ever called in to examine the victim and no medical testimony of any kind was offered in the trial to establish that the victim was either dead, or that the cause of death was from the alleged gunshot wounds. In fact, the victim laid in this deserted basement in freezing temperatures until sometime on the 25th day of December, 1950, when the Korean Policeman was the next person to see the victim. Therefore, as much as 24 hours could have elapsed from the time of the alleged shooting until this Korean Policeman saw the body. It is not established by medical evidence that either bullet wound pierced the heart, or any vital artery, or body organ. Had the proper medical authorities been called, it might well be, that this victim could have been properly treated for shock and he would have survived. In fact, there is no real proof that he ever died, in the record. If he did subsequently die, it could well have been from exposure of some 24 hours, or more, in a deserted freezing basement. This is a capital case and a Death Sentence has been imposed. It seems to the writer highly improbable that the courts of this land would place their sanction on the Death

Sentence in this case when the Corpus Delicti has not been established in a legal and proper manner.

The law recognizes that no conviction may be upheld on the basis of suspicion, conjecture and speculation.

> United States vs. Whitley (No. 2624), 3 USCMA 639; 14 CMR 57;
>
> See also United States vs. O'Neal (No. 25), I. USCMA 138; II. CMR 44, and authorities cited therein.

The test to be applied in determining sufficiency of evidence, in this case, whether or not the Corpus Delicti has been proved for if it has not been proved, it is our contention the Court would not have jurisdiction to proceed, as a matter of law is, whether reasonable means would be in accord in holding that a rational hypothesis other than that of guilty, may be drawn from the evidence (United States vs. O'Neal, supra). As stated in the concurring opinion of Lewis and McDermott, Circuit Judges, in

> Leslie vs. United States, 43 F. 2d 288, at page 290 (10th Cir., 1930).

The rule is right. The Government must establish guilt. The Court must direct a verdict if no substantial proof of guilt is offered. When the proof rests on circumstances which lead as rationally to the conclusion of innocence as of guilt, there is no proof of guilt. And nothing to go to the jury. Juries are not permitted in civil cases to speculate as to the negligence of the defendant; they should not be permitted to guess at the guilt of a defendant in a criminal case.

It is quite apparent from the record in this case that one presumption, or inference, was used as a basis for another presumption, or inference. In other words, the mere presumption that the victim was shot in the chest in two places was used as an inference that the victim died from the effects of those bullet wounds. No actual proof of such was offered and it is well established that such cannot be done.

United States vs. Ross, 92 US 281;
Looney vs. Metropolitan Railroad Company, 200 US 480;
Alexander vs. Standard Accident Insurance Co., 122 F. 2d 995 (10 Cir. 1941).

It has been held that it is necessary to show that death was caused by presenting expert testimony where such testimony was readily available.

31 ALR 2d 704. See also 26 American Jurisprudence, 482 and 1954, Accumulated Supp. to Vol. 26, 436.

The writer realizes that ordinarily it might be held that the question of whether or not there was sufficient proof offered at the Court Martial Trial, would be a question to be raised on proper review and not by way of Habeas Corpus; however, it is the contention here that by failure to legally and properly establish the Corpus Delicti, coupled with the other defects in the trial set out in this Brief, that the Court Martial Trial lost jurisdiction to proceed with the trial of the accused under all these circumstances. It is also our contention that the failure to prove the Corpus Delicti as herein

set out, together with other circumstances mentioned, shows that the trial of the appellant by Court Martial, amounted to a sham and a pretense and that he was not afforded a fair trial in accordance with the provisions of the Constitution of the United States.

CONCLUSION.

Petitioner respectfully prays the Honorable Court to cause the Writ to issue herein.

Respectfully submitted,

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